Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

NATIONAL ASSOCIATION OF REVIEW APPRAISERS AND MORTGAGE UNDERWRITERS, INC.; et al.,
Petitioners,

v.

THE APPRAISAL FOUNDATION; et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

QUESTION NO. 1

Whether it is proper to apply the Rule of Reason to a group boycott, implemented through the use of facially unreasonable membership criteria, which exclude competitors from a service essential to competition.

QUESTION NO. 2

Whether an antitrust plaintiff must negate all possible causes of economic damage proffered by defendants when the injury suffered is the type of injury likely to result from the antitrust violation.

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below subject to this petition for writ of certiorari are set forth below:

National Association of Review Appraisers and Mortgage Underwriters, Inc.

National Association of Real Estate Appraisers, Inc.

The Appraisal Foundation

The Appraisal Institute

American Institute of Real Estate Appraisers

Society of Real Estate Appraisers

American Society of Appraisers

National Society of Real Estate Appraisers

Roy X. Morris

Roy G. Green

George Hamilton Jones

Joseph S. Durant

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners, National Association of Review Appraisers and Mortgage Underwriters, Inc. ("NARA/MU") and National Association of Real Estate Appraisers, Inc. ("NAREA"), respectfully pray that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on August 29, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit was rendered on August 29, 1995, in an unreported decision (Appendix, pp. 1-17). The opinions of the United States District Court for the District of Minnesota granting respondents' motions for summary judgment are unreported decisions (Appendix, pp. 18-45 and 46-48).

JURISDICTION

The judgment of the Eighth Circuit was entered on August 29, 1995. Petitioners filed a timely petition for rehearing, which the Eighth Circuit denied in an order dated October 10, 1995 (Appendix, p. 49). The petitioners have timely filed this petition for a writ of certiorari, and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(a).

STATUTES INVOLVED

Sherman Antitrust Act, §§ 1, 2, 26 Stat. 209, as amended, 15 U.S.C. §§ 1, 2 (1988), which read as follows:

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(July 2, 1890, ch 647, §1, 26 Stat. 209; Aug. 17, 1937, ch 690, Title VIII, §1, 50 Stat. 693; July 7, 1955, ch 281, 69 Stat. 282; Dec. 21, 1974, P. L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, P. L. 94-145, § 2, 89 Stat. 801.)

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or

attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(July 2, 1890, ch 647, § 2, 26 Stat. 209; July 7, 1955, ch 281, 69 Stat. 282; Dec. 21, 1974, P. L. 93-528, § 3, 88 Stat. 1708.)

STATEMENT OF THE CASE

Petitioners are appraisal associations who were unreasonably excluded from membership in the Appraisal Foundation, a service essential to competition. Petitioners brought suit for violations of §§ 1 and 2 of the Sherman Act and for tortious interference, all on account of their exclusion from the Appraisal Foundation. In upholding the District Court's summary judgment, the Court of Appeals for the Eighth Circuit found respondents' membership requirements to be reasonable and further held that petitioners failed to satisfy the membership requirements. The Eighth Circuit made these findings in spite of respondents' admission that

there are issues of fact as to the reasonableness of the membership criteria and petitioners' alleged failure to satisfy the requirements. Respondents themselves acknowledged, "Because of these factual disputes, the Foundation did not seek summary judgment on either the reasonableness of the criteria or the [petitioners'] failure to comply with them." *Eighth Circuit Brief of Appellees* at 13. In addition, the Court of Appeals for the Eighth Circuit required petitioners to negate all possible causes of economic damage proffered by respondents in complete disregard of petitioners' injuries being those likely to be suffered by the target of a group boycott. Thus, the Eighth Circuit Court of Appeals disregarded this Court's decisions on the issues of the applicability of the *per se* rule and causation.

Petitioners NARA/MU and NAREA are professional appraisal organizations offering memberships to individual appraisers. Such appraisal organizations help organize, regulate, and bestow designations upon individual appraisers. The designations given by real estate appraisal organizations are recognized and relied upon by lending institutions, government regulatory agencies, and other users and employers of professional appraisal services.

Respondent The Appraisal Foundation ("Foundation") was formed by eight professional appraisal organizations on the heels of Congressional investigations into the role of abusive and unethical practices by real estate appraisers in the failure and insolvencies of numerous savings and loan associations. In August of 1989, Congress passed Title XI of

the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA"), which conferred upon the Foundation the power to set standards for appraisals and establish minimum qualifications for state certification and licensing of appraisers.

With this newly acquired governmental seal of approval, membership in the Foundation became a badge of credibility. Appraisers enrolled in organizations that were not members of the Foundation were disadvantaged, as lenders and other consumers of appraisal services patronized only appraisers that belonged to organizations that were members of the Foundation. In response to demands of member appraisers who requested Foundation membership, NARA/MU, NAREA, and other similarly situated associations applied for membership in the Foundation.

Since its formation in 1988, the Foundation has consistently denied membership to NAREA and NARA/MU. At the outset, the Foundation flatly stated that it was not accepting any new members. In July 1989, after nearly two years of pressure from appraiser associations desiring to obtain membership in the Foundation, the Foundation adopted membership criteria exclusively for new members. From July 1989, until late in 1991, however, the Foundation did not admit a single member in spite of numerous applications for membership. Finally, by late 1991, the Foundation understood that if it did not admit at least one new organization, Congress would probably cut off the Foundation's funding. Thus, in late 1991, the Foundation

admitted the American Association of Certified Appraisers ("AACA"), the smallest appraiser organization that had applied for membership, even though AACA did not satisfy all of the membership criteria.

Petitioners were not as fortunate. After numerous requests for further information, an unprecedented "site visit" to petitioners' headquarters, and several inquiries by petitioners as to the status of their applications, the Foundation denied membership to petitioners on the ground that it did not have enough information to make a determination as to whether petitioners satisfied the Foundation's membership criteria. Currently, the Foundation has members who do not meet the membership criteria, and has members about which it has no information as to whether such members satisfy the membership criteria. In addition, the Foundation has not taken any measures to correct this situation.

The effect of exclusion from the Foundation on professional appraisal organizations, such as NARA/MU, NAREA, National Association of Master Appraisers ("NAMA"), and AACA, was severe. These organizations suffered precipitous declines in membership. NARA/MU's membership dropped from more than 7,500 members in 1990 to fewer than 3,000 by 1993. Similarly, membership in NAREA declined from over 20,000 members in 1989 to fewer than 10,000 members in 1993. Petitioners' revenues declined as income from membership dues, educational courses and seminars, and the sale of publications all fell

sharply. Over the same period that the excluded appraisal organizations were losing members, the eight original members of the Foundation increased their membership and industry market share.

On August 4, 1994, the United States District Court for the District of Minnesota granted summary judgment to respondents on all of petitioners' claims. The district court's decision was based on three findings. First, applying the Rule of Reason, the court found that petitioners had not produced sufficient evidence that the overall market for real estate appraiser organizations was harmed. The court called such a showing of injury to the overall market "an essential element of [petitioners'] antitrust claim." (District Court Opinion at 15, Appendix, p. 33). Second, the Court held summary judgment was appropriate because petitioners failed to establish the necessary causal connection between respondents' anticompetitive conduct and petitioners' injuries. Third, the court ruled that petitioners failed to show the essential elements of concerted activity and anticompetitive intent. Based on its rulings concerning petitioners' antitrust claims, the court also found that petitioners failed to present sufficient evidence to maintain their tortious interference claim.

On appeal, the Eighth Circuit Court of Appeals upheld the district court's findings on all counts. The Court of Appeals found that the Foundation's membership criteria were not so "deleterious" as to be subject to *per se* analysis. The Eighth Circuit drew this conclusion even though

respondents did not move for summary judgment on the reasonableness of the membership criteria. The Eighth Circuit further held that petitioners failed to carry their burden on the issue of causation. In blatant disregard of this Court's decisions, the Eighth Circuit held that petitioners had not proven causation because petitioners had not negated other possible reasons for their decline in membership and the resulting pecuniary harm.

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI TO MAKE CLEAR (1) THAT THE *PER SE* ANALYSIS SHOULD BE APPLIED TO A GROUP BOYCOTT IMPLEMENTED THROUGH THE USE OF FACIALLY UNREASONABLE MEMBERSHIP CRITERIA; AND (2) THAT AN ANTITRUST PLAINTIFF NEED NOT NEGATE ALL POSSIBLE CAUSES OF ECONOMIC DAMAGE.

A. The Eighth Circuit's Holding That the Rule of Reason Is to Be Applied to Facially Unreasonable Membership Criteria, Which Exclude Competitors From a Service Essential to Competition, Is in Direct Conflict With This Court's Prior Decisions.

The Eighth Circuit erroneously applied the rule of reason to the Foundation's membership criteria. This Court

has consistently held that the rule of reason is appropriate only when the exclusion of an organization appears to serve some legitimate purpose, such as promoting the efficiency of the market. *See Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447, 458 (1986); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289 (1985). When a challenged practice is anticompetitive on its face, however, in that it produces a "pernicious effect on competition and lack[s]... any redeeming virtue," the *per se* rule is to be applied. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958).

In the instant case, the respondents admitted in their brief to the Eighth Circuit that factual disputes exist as to whether the Foundation's admission criteria are reasonable and as to whether petitioners have complied with those criteria: "Because of these factual disputes, the Foundation did not seek summary judgment on either the reasonableness of the criteria or the [petitioners'] failure to comply with them." *Eighth Circuit Brief of Appellees* at 13. Thus, due to the procedural posture, the Eighth Circuit was required to accept that the evidence permitted a jury to find that the Foundation's membership criteria were unreasonable, and that respondents had unreasonably excluded petitioners from the Foundation. In spite of respondents' failure to move for summary judgment on the issue of the admission criteria, the Eighth Circuit improperly grounded its decision not to apply the *per se* rule on the purported reasonableness of the criteria. The Eighth Circuit further applied the wrong standard in

reaching its conclusions.

When a factual dispute exists with respect to a material issue, as is the case with the reasonableness of the admissions criteria and petitioners' alleged failure to satisfy them, this Court has held that a court is required to view the evidence in the light most favorable to the non-moving party, and to draw all inferences in the non-moving party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Clearly, the Eighth Circuit did not do this. First, the Eighth Circuit should not have decided the issue of the reasonableness of the membership requirements and the petitioners' purported failure to meet them. Respondents did not move for summary judgment on these issues, as they recognized the existence of factual disputes. *Eighth Circuit Brief of Appellees* at 13 Second, had the Eighth Circuit followed the rule of *Liberty Lobby*, it would have had to conclude that the membership criteria are, on this record, unreasonable. The Eighth Circuit's analysis of any procompetitive virtues of such unreasonable membership criteria was therefore unnecessary and irrelevant. It is self-evident that unreasonable admissions criteria to an industry's standard-setting institution cannot, by definition, serve procompetitive purposes. The Eighth Circuit erred in making a factual determination that the admissions criteria served a procompetitive purpose.

The Eighth Circuit's impermissible resolution of this factual issue is highlighted at page 7 of its opinion:

> The Foundation's exclusion of the Associations does not appear so deleterious

> on its face as to be considered per se illegitimate. The Foundation was created to promote educational and ethical standards for appraisal services, and its membership criteria appear to be designed to accomplish those goals by establishing such standards and requiring non-profit status for appraisal organizations. (Appendix, pp. 8-9)

The Eighth Circuit's reasoning is directly at odds with respondents' admission that there is a factual issue as to the reasonableness of the admission criteria, and *Liberty Lobby*'s mandate that all factual disputes be resolved in the light most favorable to the non-moving party. Unreasonable admission criteria could not possibly further the "educational and ethical standards for appraisal services," as the Eighth Circuit found. To the contrary, in reviewing the lower court's summary judgment, the Eighth Circuit was required to find petitioners' exclusion from the Foundation to be *per se* unlawful.

In *Northwest Wholesale Stationers*, this Court stated that an association's refusal to deal with a competitor on substantially equal terms, as well as a complete exclusion from access, will justify *per se* invalidation if it places a competing firm at a severe competitive disadvantage. *Northwest Wholesale Stationers*, 472 U.S. at n.6; *see also Silver v. New York Stock Exchange*, 373 U.S. 341 (1963)(*citing United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 167 (1948)). In affirming summary judgment, the Eighth Circuit improperly required petitioners to "convince us that the failure to admit cuts off their ability to transact business with their members or potential members." (Opinion

at 8, Appendix, pp. 9-10). An antitrust plaintiff challenging a group boycott is not required to prove that defendants have cut off its ability to transact business. In *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), the Supreme Court held that defendant's denial to plaintiff of direct wire access to individual members of defendant's organization was a *per se* violation of Section 1 of the Sherman Act, even though defendants did not totally cut off plaintiff's access to important information. That plaintiff's immediate access to the information was "of great significance" to plaintiff's business was sufficient to invoke *per se* illegality. *Silver*, 373 U.S. at 343. The Supreme Court does not require that a victim of a group boycott be incapable of continuing in business. The antitrust plaintiff need only be placed at a competitive disadvantage with the boycotting firms. Clearly, petitioners have met this burden here through evidence of declines in membership, requests by their members for Foundation affiliation, diminishing revenues, membership declines in other appraiser organizations not belonging to the Foundation, the Foundation's market share, and the demand of consumers of appraiser services for appraisers with Foundation affiliation.

Moreover, the Eighth Circuit's entire analysis of *per se* treatment proceeded from the invalid premise that the membership criteria were reasonable:

> Given the apparent facial validity of the exclusion of the Associations by the Foundation, whatever restraint that exclusion poses must be analyzed under the rule of

> reason to determine the extent of its power and effect on competition. This will in turn answer the question whether indeed the Foundation is an essential facility and if any denial of access is truly anticompetitive in nature. (Opinion at 8, n.2, Appendix, p. 10)

As shown, this assumption was unwarranted and contrary to respondents' concession. The Court then relied on this erroneous premise to conclude that petitioners were not denied access to any facility essential to competition. The Eighth Circuit used its improper factual finding of reasonableness to avoid making the analysis required by *Silver v. New York Stock Exchange*, and thus its decision is contrary to settled law.

B. The Eighth Circuit's Holding That An Antitrust Plaintiff Must Negate All Possible Alternative Causes Of Economic Damage Is Inconsistent With This Court's Prior Decisions.

In affirming the district court's summary judgment, the Eighth Circuit held that an antitrust plaintiff must negate all possible alternative causes of economic damage. While the Eighth Circuit *cited* the proper standard at page 11 of its opinion (Appendix, pp. 13-14), the analysis that followed did not apply the standard. Petitioners do not need to negate all possible explanations for their losses, as was required by the Eighth Circuit.

To prevail on a Section 1 claim, an antitrust plaintiff must prove the element of causation. On a motion for

summary judgment, the plaintiff will meet its burden on the issue of causation if a reasonable jury could find that the injury is the type of injury likely to result from the violation. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 697 (1962). Moreover, when the claimed injury results from partial exclusion from a market, as in the instant case, a plaintiff need not come forward with "the kind of concrete, detailed proof of injury which is available in other contexts." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969). The burden of showing material cause is not a difficult one. "[A plaintiff's] burden of proving the fact of damage under Section 4 of the Clayton Act is satisfied by its proof of some damage flowing from the unlawful conspiracy.'" *Id.* at n.9. The Eighth Circuit acknowledged that petitioners suffered a decline in membership: "There can be no doubt that [petitioners] have suffered a declining membership base in recent years." (Eighth Circuit Opinion at 9, Appendix, p. 10). A decline in membership is exactly the type of injury one could expect to flow from a conspiracy to exclude petitioners from the Foundation. In apparent disregard of the foregoing authorities, the Eighth Circuit held in substance that summary judgment was warranted because petitioners had not negated all possible causes of their decline in membership. Viewing all the evidence in the record, the Eighth Circuit concluded that there were too many alternative adverse inferences to be drawn against petitioners. The Eighth Circuit chose to believe the inferences argued by respondents and discounted

petitioners' evidence of lost members, members demanding Foundation affiliation, and members who were at a competitive disadvantage in competing for appraisal jobs. In so doing, the Eighth Circuit improperly discounted or ignored reasonable inferences supporting petitioners' claim, and construed the evidence in the light least favorable to petitioners.

In weighing competing inferences on the issue of causation, the Eighth Circuit usurped the role of the jury, and contravened the teachings of this Court. "Where the plaintiff proves a loss, and a violation by defendant of the antitrust laws of such a nature as to be likely to cause that type of loss, there are cases that say that the jury, as the trier of the facts, must be permitted to draw from this circumstantial evidence the inference that the necessary causal relation exists." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 697 (1962). Here, respondents have conceded the violation, exclusion by unreasonable membership criteria; and the evidence shows a loss of enrollment such as would be expected to result from the violation. The issue of causation must therefore be left to the jury, regardless of whatever else the record shows as a potential cause. If an antitrust plaintiff presents enough evidence "to support an inference of causation, the ultimate conclusion as to what that evidence proves is for the jury." *Perkins v. Standard Oil Co. of California*, 395 U.S. 642, 648 (1969). Petitioners needed only offer enough evidence to support an inference of causation. Whether petitioners' explanation for their losses or

appellees' explanation for the losses is more credible is for the jury to decide. The Eighth Circuit both usurped petitioners' right to a trial by jury and ignored controlling case law when it weighed the credibility of each party's explanations for petitioners' losses.

CONCLUSION

In affirming the district court's summary judgment, the Eighth Circuit made two extraordinary rulings that directly conflict with precedents of this Court, as well as the evidence admitted to be of record by respondents themselves. First, the Eighth Circuit ruled that petitioners' exclusion from the Foundation must be judged under the Rule of Reason, when respondents themselves acknowledged that a jury could find the Foundation's membership criteria and their application to petitioners to be unreasonable. Petitioners respectfully submit that antitrust law without exception condemns as *per se* unlawful such exclusion by unreasonable standards or their arbitrary and discriminatory application. Second, the Eighth Circuit held that although respondents conceded sufficient evidence to show a violation (exclusion by unreasonable membership criteria) and the type of injury likely to result from the violation (loss of members by petitioners), a jury could not find causation, because petitioners had not refuted other possible causes of injury suggested by respondents. Petitioners respectfully submit that the Eighth Circuit imposed a standard of proof contrary to what is established by this Court's precedents.

This Court has long stressed the importance of the

private treble damage action. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968); *American Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 569 (1982); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969); *Hanover Shoe v.United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968); *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 329 (1955). In view of this solicitude for private antitrust enforcement, this Court has gone so far as to adopt a "traditional rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 565-66 (1981); *Zenith v. Hazeltine*, 335 U.S. at 123-24; *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 573 (1990). The decision of the Court of Appeals in this case is a serious and direct threat to the antitrust jurisprudence developed by this Court over the last century. It imposes on antitrust plaintiffs standards of proof that this Court has many times rejected and admonished lower courts to eschew. Because of the importance of vigorous and effective private antitrust enforcement, and the dangers posed thereto by the Eighth Circuit's decision in this case, this Court should grant certiorari.

On the basis of the foregoing arguments and authorities, therefore, petitioners respectfully petition this Court for a writ of certiorari to review the questions presented herein.

Respectfully submitted this ____ day of January, 1996.

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 94-2689

National Association of
Review Appraisers and
Mortgage Underwriters, Inc.,
Plaintiff/Appellant,

v.

The Appraisal Foundation;
The Appraisal Institute;
American Institute of Real Estate
Appraisers; Society of Real Estate
Appraisers; American Society of
Appraisers; National Society of
Real Estate Appraisers,
Defendants/Appellees.

Appeals from the United States District Court for the District of Minnesota.

The Appraisal Foundation,
Plaintiff/Appellee,

v.

National Association of Real
Estate Appraisers, Inc.,
Defendant/Appellant.

No. 94-3074

The Appraisal Foundation,
Plaintiff,

v.

National Association of Real
Estate Appraisers, Inc.,
Defendant.

and

National Association of Real
Estate Appraisers, Inc.,
Counter-Plaintiff/Appellant,

v.

The Appraisal Foundation; The
Appraisal Institute; American Institute
of Real Estate Appraisers; Society of
Real Estate Appraisers; American
Society of Appraisers; National Society
of Real Estate Appraisers,
Counter-Defendants/Appellees.

National Association of Review Appraisers and Mortgage Underwriters, Inc.; National Association of Real Estate Appraisers, Inc.,
Plaintiffs/Appellants,

v.

Roy Morris,
Defendant/Appellee.

National Association of Review Appraisers and Mortgage Underwriters, Inc.; National Association of Real Estate Appraisers, Inc.,
Plaintiff/Appellants,

v.

Roy G. Green; George Hamilton Jones,
Defendants/Appellees.

National Association of Review Appraisers and Mortgage Underwriters, Inc.; National Association of Real Estate Appraisers, Inc.,
Plaintiffs/Appellants,

v.

Joseph S. Durant,
Defendant/Appellee.

Submitted: May 16, 1995
Filed: August 29, 1995

Before WOLLMAN and MORRIS SHEPPARD ARNOLD, Circuit Judges, and BOGUE,* Senior District Judge.

WOLLMAN, Circuit Judge.

The National Association of Review Appraisers and Mortgage Underwriters and the National Association of Real Estate Appraisers (hereinafter referred to as the "Review Association" and "Appraisers' Association" individually, and collectively as the "Associations") appeal from the district court's[1] orders granting summary judgment for the Appraisal Foundation and certain of its member organizations and trustees (collectively the "Foundation") on the Associations' various antitrust and tortious interference claims. We affirm.

I.

In the mid 1980s, as pressure began to increase for regulation of the appraisal industry in the wake of the nationwide savings and loan debacle, a number of appraisal organizations decided to get together to set standards for the industry in an attempt at self-regulation. As a result of this union of interests, the Foundation was created in 1987 to establish uniform appraisal standards and criteria for certifying

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* The HONORABLE ANDREW W. BOGUE, Senior United States District Judge for the District of South Dakota, sitting by designation.

[1]The Honorable Diana E. Murphy, then Chief Judge, United States District Court for the District of Minnesota, now United States Circuit Judge for the United States Court of Appeals for the Eighth Circuit.

appraisers. The eight founding member organizations appointed between one and three trustees to the Foundation depending on their size. Other members, which were organizations composed of users of appraisal services, were allowed to appoint one trustee to the board, and two at-large trustees were elected by the appointed trustees. In 1989, Congress passed Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), which charged the Foundation's Appraiser Standards Board and Appraiser Qualifications Board with promulgating industry standards for federally related transactions. See 12 U.S.C. §§ 3339, 3345.

In 1991, the Foundation amended its by-laws to create three different types of sponsorship to the Foundation effective January 1, 1992 -- appraisal, affiliate, and corporate. Appraisal sponsors are appraisal organizations; whereas affiliate and corporate sponsors are, respectively, non-profit and for-profit organizations with a "demonstrable interest" in appraisals and appraisal practices. The board of trustees is now composed of one trustee for each appraisal and affiliate sponsor that meets sponsorship criteria, and fourteen at-large trustees selected from a pool of candidates sponsored by each category of affiliation. Since the by-laws were amended, the Foundation has admitted two appraisal and three affiliate members, as well as several corporate sponsors. About 66% of all appraisers (62,651 total) belonged to organizations affiliated with the Foundation in 1990. As of 1992, membership encompassed approximately 71% of all appraisers (70,221 total).

The Review Association filed an antitrust action under

the Sherman Act, 15 U.S.C. §§ 1 & 2, in 1991, challenging the Foundation's continuing refusal to admit the Review Association as an appraisal sponsor dating back to its initial application for membership in 1988. The Review Association claims that it meets all membership criteria and that the Foundation's control over the industry has effectively crippled the Review Association's ability to compete with other appraisal organizations that are Foundation members. The Foundation subsequently brought a declaratory judgment action against the Appraisers' Association seeking to establish that the Foundation had not violated the antitrust laws for likewise declining to grant that organization membership status. The Appraisers' Association counterclaimed, asserting claims similar to those of the Review Association. These are apparently the only two appraiser organizations that have applied but not been admitted to sponsorship in one form or another. Both are managed by the same corporate entity, International Association Managers, Inc., and are essentially controlled by the same individual and executive director, Robert G. Johnson. Ken Twitchell is the managing director of the Appraisers' Association and director of national affairs for the Review Association. The cases were consolidated with several cases brought by the Review Association against the Foundation's trustees.

II. Antitrust Claims

A.

The Associations assert that the Foundation's actions constitute a per se antitrust violation as a group boycott. The direct result of this failure to admit, according to the

Associations, has been a marked decline in membership, with the Review Association's membership declining from more than 7,500 in 1990 to fewer than 3,000 members by 1993, and the Appraisers' Association seeing its membership drop from a peak of more than 20,000 in 1989 to fewer than 10,000 in 1993. These numbers take on even more meaning for the Associations when considered in light of the fact that their respective memberships had increased over the three year period prior to 1990. As further evidence of the anticompetitive nature of exclusion, the Associations contrast the declining membership of other organizations during periods those organizations were not members of the Foundation with the increased membership of those within the Foundation.

When challenged actions or practices yield a "pernicious effect on competition and lack . . . any redeeming virtue" they are per se invalid. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958). In such situations the actions so lack redeeming social and competitive value as to warrant being struck down "without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Id.; See Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284, 289 (1985). The Foundation's membership criteria are inherently exclusionary and thereby necessarily restrict competition to some degree. See Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 (1988) (noting that an agreement regarding product standards is an implicit agreement not to deal in non-conforming products); Northwest Stationers, 472 U.S. at 289

(acknowledging that "every commercial agreement restrains trade"). When the exclusion of an organization on the purported basis of those criteria appears to serve some legitimate purpose necessary to the proper functioning of the Foundation and overall efficiency of the market, however, we will analyze that exclusion under the rule of reason to determine whether it in fact does impermissibly restrict competition. See Federal Trade Comm'n v. Indiana Fed'n of Dentists, 476 U.S. 447, 458 (1986) (noting reluctance "to condemn rules adopted by professional associations as unreasonable per se"); Northwest Stationers, 472 U.S. at 297-98 (expulsion from wholesale cooperative does not warrant per se treatment) . Organizations are free to associate, share information, and engage in self-regulation. Accordingly, in the absence of any showing that the challenged practices are anticompetitive on their face, we will apply the rule of reason to determine if there is an antitrust violation. Additionally, courts should hesitate to apply a per se rule when there is a question as to the extent of a practice's economic impact. See Indiana Dentists, 476 U.S. at 458-59; see also United States v. Brown Univ., 5 F.3d 658, 672 (3d Cir. 1993) (accepting that economic harm is less certain when the market restraint is motivated by its socially utility).

The Foundation's exclusion of the Associations does not appear so deleterious on its face as to be considered per se illegitimate. The Foundation was created to promote educational and ethical standards for appraisal services, and its membership criteria appear to be designed to accomplish those goals by establishing such standards and requiring non-profit

status for appraisal organizations. Such requirements generally pose merely incidental market restraints and are necessary to successful industry self-regulation. Establishing and enforcing such criteria may even serve some pro-competitive purposes by increasing the relative market efficiencies. See Allied Tube, 486 U.S. at 501 (noting that where "private associations promulgate . . . standards based on the merits of objective expert judgments and through procedures that prevent the standard setting process from being biased by members with economic interests in stifling product competition . . . those private standards can have significant procompetitive advantages"); Pope v. Mississippi Real Estate Comm'n, 872 F.2d 127, 130 (5th Cir. 1989) ("If properly administered, membership requirements serve pro-competitive purposes.").

Further, finding a per se violation is not mandated by the antitrust laws because this is not a case in which the alleged boycott "cut[s] off access to a supply, facility, or market necessary to enable the boycotted [associations] to compete." Northwest Stationers, 472 U.S. at 294. To accept the Associations' argument to the contrary would require us to hold that every appraiser organization has an intrinsic and immutable right to membership in the Foundation. This is clearly not what Congress intended when it vested the Foundation with the authority to establish standards. Indeed, such a holding would defeat the very purpose of having the Foundation establish standards and admission criteria. The Associations have failed to convince us that the failure to admit cuts off their ability to

transact business with their members or potential members.[2] Access to the market cannot be equated with success in the market. Nor does the exclusion eliminate access of their members to the related market of those in need of appraisal services.

B.

There can be no doubt that the Associations have suffered a declining membership base in recent years. That, however, is not the full extent of our inquiry. See National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 690 (1978) (confining the inquiry "to a consideration of impact on competitive conditions"). We need not decide whether the Foundation has engaged in conspiratorial behavior, or whether

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[2] We recognize the subtle distinctions that may alter an analysis from per se to the rule of reason and the potential blurring of those distinctions when faced with a combination such as we have here. See SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 963 (10th Cir. 1994), cert. denied, 115 S. Ct. 2600 (1995) (No. 94-1719); see also 7 P. Areeda & H. Hovenkamp, Antitrust law ¶¶ 1511, 1511' (1986 & Supp. 1994) (discussing the collapsing inquiry). We need not anatomize the precedents to crystallize their theoretical development, however. Suffice it to say that our analysis of the relevant economic structures and market forces at issue here makes it evident that this is not a situation requiring per se treatment. See generally National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 104 n.26 (1984) (noting that "[p]er se rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct"). Nor do the Associations' claims that the market power vested in the Foundation by the combination of its members represents a facility essential to competition. Given the apparent facial validity of the exclusion of the Associations by the Foundation, whatever restraint that exclusion poses must be analyzed under the rule of reason to determine the extent of its power and effect on competition. This will in turn answer the question whether indeed the Foundation is an essential facility and if any denial of access is truly anticompetitive in nature. See Areeda & Hovenkamp, supra, ¶¶ 736.2a, 736.2f (Supp. 1994) (asserting that denial of access to an essential facility is never deemed per se unlawful). This is entirely consonant with the usual application of the rule of reason standards to such cooperative conduct.

the Foundation is capable of such conduct, for even assuming such to be the case, the Associations have failed to generate the inference of causal harm necessary to their claim.

The parties agree that the market in which appraiser organizations vie for members is the relevant market. Thus, the issue is properly framed as whether the Foundation's refusal to admit the Associations has made the market for appraisal organizations less competitive. A group boycott results in impermissible harm even if it results in lower prices or temporarily stimulates competition because such boycotts have, by their "nature and character, a monopolistic tendency" to restrain free trade. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959) (internal quotes omitted). In the absence of such a per se violation of the antitrust laws, however, incidental harm to an individual competing in the market is a necessary residuum of the competitive process. In such an environment one competitor will always suffer some form of "harm" relative to a competitor that gains an advantage. See Town of Concord v. Boston Edison Co., 915 F.2d 17, 21 (1st Cir. 1990), cert. denied, 499 U.S. 931 (1991). Society reaps the benefits of such competitive behavior through lower prices, better products and services, and greater market efficiencies as individual competitors seek to gain an advantage. Only anticompetitive behavior, i.e. behavior that tends to lessen the potentiality for society to realize the benefits of the competitive process, is proscribed. See id. at 21-22; Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

The Associations attempt to foist blame on the

Foundation for a decrease in the number of appraisers operating in the United States today and the attendant rise in cost of appraiser services. The Associations offered some evidence that consumers of appraiser services prefer appraisers that are members of organizations affiliated with the Foundation. There is no evidence tending to connect the Associations' individual harm to any such harm on the overall market for appraisal organizations, however. The Associations' claims of harm to the market reflect mere individual harm. See T.W Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 635 (9th Cir. 1987) (party cannot withstand summary judgment motion in absence of evidence of harm to competition). Blaming the Foundation for fluctuations in the market for individual appraiser services, and the resulting impact on association memberships, fails to raise a sufficient inference that there was harm to the competition among appraiser organizations. See Legal Economic Evaluations, Inc. v. Metropolitan Life Ins., 39 F.3d 951, 954-56 (9th Cir. 1994) (finding asserted harm to competition to actually lie in a different market), cert. denied, 115 S. Ct. 1420 (1995). Rather, such claims are contradicted by evidence of an increase in the number of educational programs offered by the Associations as they compete with other organizations for the affiliation of appraisers. Nor is there any evidence that membership prices in organizations have increased or that the number and quality of such organizations or their output in terms of educational offerings or other benefits to their members has decreased since the dawn of the Foundation. See Visa USA, 36 F.3d at 968 (lack of evidence of

increased price, decreased output, or other anticompetitive indicia in the relevant market shows that challenged collective rule making body lacks market power).

Even if we were to accept further that the decline in the Associations' membership ranks could sufficiently establish harm to the overall market in which appraisal organizations compete, such a claim must fail in this instance for a lack of a sufficient causal nexus to the Foundation's activities. To succeed on their claims, the Associations must show that a reasonable jury could find that the Foundation's exclusionary behavior was a material cause of the harm suffered. See Alexander v. National Farmers Org., 687 F.2d 1173, 1210 (8th Cir. 1982), cert. denied, 461 U.S. 937, 938, 939 (1983). The Associations "may not recover for losses due to factors other than the [Foundation's] anticompetitive violations." Amerinet, Inc. v. Xerox Corp., 972 F.2d 1483, 1494 (8th Cir. 1992), cert. denied, 113 S. Ct. 1048 (1993).

A number of highly publicized missteps and other considerations have contributed greatly to the Associations' current deflated membership base, so much so that the Associations cannot claim that their exclusion from the Foundation was a substantially contributing factor to their problems. See Greater Rockford Energy & Tech. Corp. v. Shell Oil, 998 F.2d 391, 404 (7th Cir. 1993), cert. denied, 114 S. Ct. 1054 (1994). First, they have received a great deal of negative attention for maintaining lax standards. That cat was let out of the bag, so to speak, when the Appraisers' Association designated a feline named Tobias as a member without verifying

his credentials. The Appraisers' Association sued Tobias' owner for defamation when he publicly called the association a diploma mill in the wake of this incident. In that suit, the Appraisers' Association claimed that it had witnessed a dramatic drop in membership renewal rates as a result of the negative publicity. The district court found the characterization accurate and denied relief. National Ass'n of Real Estate Appraisers, Inc. v. Schaeffer, C.A. No. 89-0225T (D.R.I. Jun. 1, 1989); see also National Ass'n of Real Estate Appraisers, Inc. v. Schaeffer, No. CV 88-7774-RJK (TX) (C.D. Cal. Mar. 23, 1989) (dismissal for lack of personal jurisdiction).

That case was referred to in the course of the adoption of subsequent amendments to FIRREA. The House Operations Committee specifically noted that it did "not intend in any way to suggest that membership [in the Foundation] should be available to such groups as the National Association of Real Estate Appraisers and its related organizations," precisely because of the finding that they were diploma mills. H.R. Rep. No. 101-981, 101st Cong., 2d sess. l, 7 n.1 (1990). There can be little doubt but that the lingering stigma of this incident has contributed greatly to the Associations' difficulty in attracting and retaining members.

The Appraisers' Association has also blamed the State of Washington for a decrease in membership. In 1990, the Association filed suit alleging that a designation of state-licensed appraisers as "State-Certified Real Estate Appraisers" infringed on the Association's trademark rights regarding the "Certified Real Estate Appraisers" designation. In an affidavit

submitted in that case, Johnson stated that the state legislation had caused the Association to lose members. The present litigation has also been a drain on membership strength.

In addition to their own litigious efforts to assign blame for their decreased market share, Johnson and Twitchell have both faced recent legal action on other fronts. Both pleaded guilty to charges stemming from a Federal Elections Commission investigation into illegal contributions to the 1988 presidential campaign. Further, the Department of Labor filed suit against International Association Managers for failing to account for and pay overtime to certain former employees. These incidents have done little to enhance the reputation or membership ranks of either association.

Further, representatives of the American Association of Certified Appraisers and the National Association of Master Appraisers, two other appraisal organizations that also witnessed declining membership before they became Foundation members (which membership decline the Associations point to as evidence of the harm on the overall market), attribute the decline in membership to factors entirely independent from the activities of the Foundation. The advent of state certification has rendered less essential affiliation with an organization and has apparently affected the entire industry. As noted above, the overall market for appraisers has declined, and the Foundation is not to be faulted for the natural market forces driving the market for real estate appraisers. Moreover, the impact of the restraint, whatever it may be, cannot be adequately determined because the Associations apparently could participate in the

Foundation in another capacity, an avenue they have not explored.

The Associations have blamed everyone but themselves for their current difficulties, but their problems can be traced directly back to the corporate office. We do not require a negation of all possible explanations for the decreased membership, but in the face of this record the allegations of conspiratorial harm are too speculative to raise a triable issue. Accordingly, because the Associations have failed to establish the existence of a triable fact on the issue of causation, an element essential to their case, the entry of summary judgment in favor of the Foundation was entirely appropriate. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 576 (1986) (must show conspiracy and injury to survive motion for summary judgment).

III. Tortious Interference

Citing their decreased membership base and attendant reduction in revenues, the Associations next contend that the Foundation's actions constitute a tortious interference with contractual relations under Minnesota law. To fashion such a claim, the Associations must show that the Foundation intentionally and wrongfully interfered with existing or prospective contractual relations and that but for the Foundation's actions they would have received the benefits of those relations. See United Wild Rice, Inc. v. Nelson, 313 N.W.2d 628, 632-33 (Minn. 1982); Amerinet, 972 F.2d at 1506, 1508. Our discussion of the causation aspect of the

antitrust claims sufficiently disposes of this issue. Amerinet, 972 F.2d at 1508-09. In light of the host of problems faced by the Associations, they are unable to make out a submissible case that had they been admitted to the Foundation they would have retained members and attracted new members.

The judgment is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In re Appraiser Foundation
Antitrust Litigation — Master File No. 93-MD-973

MEMORANDUM OPINION
AND ORDER

This document relates to: All Cases

Daniel Shulman, Esq., 2999 Norwest Center, 90 South Ninth Street, Minneapolis, MN 55402, appeared for plaintiffs National Association of Real Estate Appraisers, Inc., and National Association of Review Appraisers & Mortgage Underwriters, Inc.

Peter Hendrixson, Esq., and Kathleen Sheehy Esq., Dorsey & Whitney, 2200 1st Bank Place East, Minneapolis, MN 55402, appeared for defendant Appraisal Foundation.

David Marx, Jr., Esq., McDermott, Will & Emory, 227 West Monroe Street, Chicago Il 60606, appeared for defendant Appraisal Institute.

Lorne Zenner, Esq., 1122 Pioneer Building, St. Paul, MN 55101 appeared for the American Society of Appraisers.

Plaintiffs National Association of Review Appraisers and Mortgage Underwriters (NARA/MU) and National Association of Real Estate Appraisers (NAREA)[1] assert federal claims under the sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. §§ 1 and 2) and state common law claims for tortious interference with contract and prospective business relations against the defendants Appraisal Foundation (Foundation), its sponsors, and trustees. The court has jurisdiction under 28 U.S.C. §§ 1337 and 1367. Defendants[2] have moved for summary judgment.

I.

In 1991, NARA/MU filed an antitrust action in this court against the Foundation and its sponsors[3]. The Foundation then brought a declaratory judgment action in 1992 against NAREA seeking a declaration that it had not violated the antitrust laws by refusing to admit NAREA[4]. NAREA counterclaimed, asserting similar claims against the Foundation as in the NARA/MU action. The cases were consolidated for pretrial

[1] For convenience, the parties were realigned pursuant to Management Order No. 1 dated August 2, 1993. Plaintiff NARA/MU and counterclaim-plaintiff NAREA are collectively referred to as "plaintiffs", and their claims and counterclaims are collectively referred to as "claims".

[2] The defendants here are the Foundation, the National Society of Real Estate Appraisers (NSREA), the American Society of Appraisers (ASA), and the Appraisal Institute.

[3] Civ. No. 4-91-294 (D. Minn. 1991).

[4] Civ. No. 4-92-620 (D. Minn 1992).

and trial purposes, and NAREA amended its complaint to make it identical to the NARA/MU claims. Several additional cases involving claims against trustees of the Foundation were later transferred to this district for pretrial management.[5]

The Appraisal Foundation was created in 1987 to establish uniform appraisal standards and criteria for certifying appraisers through its Appraiser Standards Board (ASB) and Appraiser Qualifications Board (AQB). Each board consists of five members appointed by the board of trustees of the Foundation. In 1989, Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), which expressly adopted the standards set by the ASB and AQB. 12 U.S.C. §§ 3339 (uniform standards) and 3345 (qualifications).

Plaintiffs contend that they are being unfairly excluded from the Foundation. They argue this exclusion traces back to the beginnings of the Foundation. Plaintiffs claim the predecessor of the Foundation was the North American Conference of Appraisal Organizations (NACAO). NACAO had been formed in the early 1970's by defendants and five other appraisal

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[5] In the original cases NAREA and NARA/MU asserted claims against the Foundation, its sponsors, and the individual trustees. The trustees were dismissed for lack of personal jurisdiction. NAREA and NARA/MU then refiled claims against the trustees in the districts in which they live. All of those claims have been settled except three actions transferred here for pretrial purposes by the Judicial Panel on Multidistrict Litigation: NARA/MU et al., v. Roy X. Morris et al., Civ. No. 4-93-573 (from the District of Arizona), NARA/MU et al., v. Roy Green et al., Civ. No. 4-93-574 (from the Central District of California), and NARA/MU et al., v. Joseph Durant et al., Civ. No. 4-93-575 (from the Southern District of Georgia). The dispositive motion filing deadline for the individual trustee cases was set for October 2, 1993, except for any motions which could only be brought after entry of judgment in the original cases. Management Order No. 1, August 2, 1993.

organizations. These groups held an annual two day meeting where they exchanged business information and ideas. Plaintiffs claim outside organizations such as NAREA and NARA/MU were excluded.

In the mid 1980's, pressure began to build for regulation of the appraisal industry after developments with savings and loan institutions caused concern. Plaintiffs contend the members of NACAO decided to form the Foundation to set standards internally in an effort to head off government regulation. The Foundation was incorporated in 1987 with each of the member organizations contributing funds on a proportional basis according to the number of members it had. The eight founding appraisal organizations were "regular members" and were entitled to appoint between one and three trustees each, depending on the size of the organization.[6] There were also six "special members" which were organizations composed of users of appraisal services.[7] Each special member could appoint one trustee to the board.

Plaintiffs contend that under the Foundation's constitution and by-laws, the founding members retained veto power over all actions of the trustees. The original by-laws and articles of

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[6] The original regular members were the American Institute of Real Estate Appraisers (AIREA), the American Society of Appraisers (ASA), the American Society of Farm Managers and Rural Appraisers, The International Association of Independent Fee Appraisers, the National Society of Real Estate Appraisers (NSREA), and the Society of Real Estate Appraisers (the Society).

[7] The original special members were: the Amercian Bankers Association, the American Real Estate and Urban Economics Association, the Mortgage Bankers Association, the Real Estate Educators Association, the Urban Land Institute, and the United States League of Savings Institutions.

incorporation did not provide for vetoes, but founding members had the right to vote on proposed amendments to the by-laws and articles and each appointing organization could remove its trustee before expiration of the trustee's term under certain circumstances. Original By-laws §§ 4.01 and 5.02 (Defendants' Volume III Exhibit 1). The power of a sponsor to remove its appointed trustee before the expiration of the trustee's term was eliminated when the by-laws were revised. Effective January 1992, trustees could only be removed by a two-thirds vote of the board. Revised By-laws § 6.02(f).

In January 1991, the Foundation amended its by-laws to eliminate "memberships" effective January 1992. Three different types of sponsorship were created: Appraisal Sponsors, Affiliate Sponsors, and Corporate Sponsors. Appraisal Sponsors are appraiser organizations; this is the category to which plaintiffs wish to be admitted. Affiliate Sponsors are not appraiser organizations, but rather other non-profit, tax-exempt, organizations "having a demonstrable interest in the appraisal profession." Corporate Sponsors are for-profit organizations having a "demonstrable interest" in the practical use of appraisals and appraisal practices.

The board of trustees consists of one appointed trustee for each Appraisal and Affiliate Sponsor and at least 14 at-large trustees elected by the appointed trustees from a pool of candidates nominated by all three categories of Sponsors (Appraisal, Affiliate, and Corporate). Appraisal and Affiliate Sponsors who do not meet all of the sponsorship criteria are entitled to nominate an at-large trustee, but they may not

appoint anyone to the board. Corporate Sponsors may nominate an individual to serve as an at-large trustee.[8]

Defendants maintain that virtually any interested organization may participate in the Foundation in one form or another, and NAREA and NARA/MU are the only organizations that have applied but have not been admitted to sponsorship. Since January 1991 the Foundation has admitted two new Appraisal Sponsors: the American Association of Certified Appraisers (AACA) and the National Association of Master Appraisers (NAMA).[9] Three organizations have become Affiliate members under the revised by-laws: The Mortgage Insurance Companies of America, the Farm Credit Council, and the National Association of Realtors. Organizations admitted as Corporate Sponsors include: Lender's Services, a subsidiary of the Prudential Insurance Company, and the Mortgage Guaranty Corporation. Defendants state there are no pending applications besides those of plaintiffs.

While NAREA and NARA/MU appear to defendants to qualify as Corporate Sponsors, they wish to be admitted as Appraisal Sponsors. The Foundation maintains plaintiffs simply do not meet the criteria to be Appraisal Sponsors. To qualify as an Appraisal Sponsor an applicant must:

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[8] The current board has 32 voting members consisting of 9 members appointed by Appraisal Sponsors, 9 by Affiliate Sponsors, and 14 elected at-large.

[9] In addition, the Appraisal Institute was admitted as an Appraisal Sponsor after two existing Appraisal Sponsors, AIREA and the Society, merged. AIREA and the Society then withdrew from the Foundation.

1. be a non-profit, tax-exempt organization;
2. pay an initial fee of $18,800 and a pro rata share of the current dues assessed, and demonstrate a financial ability to pay on an ongoing basis;
3. adopt the Uniform Standards of Professional Appraisal Practice (USPAP), including the Ethics Provision[10];
4. have an educational mechanism for teaching the USPAP, including the Ethics Provision, to its members and a disciplinary mechanism for enforcing them. A minimum five year history of standards, ethics, education and enforcement is preferred;
5. require all its appraisal designated members or persons seeking appraisal designations to complete at least 15 hours of classroom work on the USPAP, including the Ethics Provision, every 5 years;
6. award appraisal designation(s) but not all members must be designated;
7. must require its appraisal-designated members to achieve the minimum criteria adopted by the Appraiser Qualifications Board and must require its applicants to pass an examination. In addition, an organization must require its appraisal-designated members to achieve

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[10] The Ethics Provision sets standards for appraisal practices as to conduct, management, confidetiality, and record keeping. As stated in the comment to the preamble, the Ethics Provision "emphasizes the personal obligations and responsibilities of the individual appraiser. However, it should also be emphasized that groups and organizations engaged in appraisal practice share the same ethical obligations."

the continuing education prerequisites adopted by the AQB.

See, defendants' Exhibit 6.

Defendants contend that both NAREA and NARA/MU are not non-profit organizations because each is owned and controlled by Robert Johnson and operated by his management company, International Association Managers, Inc. (IAM), a for-profit corporation. Johnson Deposition at 24. They point out that NAREA and NARA/MU are run out of Johnson's Scottsdale office building where no signs indicate NAREA and NARA/MU are located there. IAM has no written management contracts with NAREA and NARA/MU or the other organizations it services. Id. at 36. Johnson was paid $200,000 to $450,000 by IAM for his management services in the years 1989-1991, but does not know how the figures were arrived at. Id. 138-42. There are no documents reflecting how these fees were calculated. Id. at 152. Defendants believe the informal arrangements between corporations all owned and controlled by Johnson suggest that NAREA and NARA/MU are not really non-profit entities.

Plaintiffs claim the criteria for new admissions into the Foundation were not issued until two years after the Foundation became viable and that they have been continuously modified since. NAREA and NARA/MU applied for sponsorship in April 1989 and have complied with all requests for additional information since then. They argue that the founding members of the Foundation do not meet all the current admission

criteria[11] and that new organizations have been admitted which have not met all the criteria. Plaintiffs argue that the American Association of Certified Appraisers (AACA), a for-profit corporation, was admitted on its promise that it would convert to a non-profit.[12] NAREA and NARA/MU argue they are being held to a higher standard than other applicants and are being forced to prove they satisfy each criterion.

Defendants argue summary judgment is appropriate because: l) plaintiffs' claims against the Foundation are precluded because of the res judicata effect of their settlements of identical claims in separate actions against the trustees; 2) plaintiffs' Sherman Act Section 1 and 2 claims fail because plaintiffs cannot establish the existence of an agreement or combination to restrain trade or that the Foundation or its sponsors have caused any antitrust damage to plaintiffs; 3) the Section 1 claim fails under the rule of reason because plaintiffs cannot show competition has been harmed by the Foundation's enforcement of its membership criteria, or that the criteria constitute an unreasonable restraint of trade; 4) the section 2 claim fails because plaintiffs cannot prove intent to monopolize the relevant market; and 5) the tortious interference claim fails because plaintiffs cannot prove either an intentional act or the

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[11] Plaintiffs claim the National Society of Real Estate Appraisers (NSREA) for example, has no office, no employees, does not keep records of pass/fail for examinations, and waives some requirements for designations.

[12] Defendants argue the admission was contingent on the association's meeting the criteria. Proof of compliance was provided, and admission was approved.

required level of causation under Minnesota law.[13]

II.

Defendants believe plaintiffs' claims are now barred by res judicata. They argue that NAREA and NARA/MU split their causes of action against the Foundation by bringing separate, but identical, actions against a number of trustees in other districts. Seven of those cases have been dismissed with prejudice after settlements were reached. Defendants contend that because the Foundation is in privity with its trustees, all further claims against it are barred by final judgments on the merits in identical trustee actions.

NAREA and NARA/MU respond that the release of one alleged coconspirator in an antitrust case cannot be used to bar plaintiffs from prosecuting other alleged coconspirators unless the parties to the release specifically state an intention to release other coconspirators. Plaintiffs rely on Zenith Radio Corp. v. Hazletine Research, Inc., 401 U.S. 321 (1971).

In Zenith the Supreme Court reversed a lower court ruling that the defendant was entitled to benefit from a release plaintiff had executed with other coconspirators. Extending the effect of the settlement would not be consistent with the aims and purposes of the treble damage remedy under the antitrust laws. Id. at 346. The Court also recognized the problems inherent in management of multiparty and multidistrict litigation of these cases:

We must keep in mind the multistate and multiparty

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[13] Defendants also renew their contention that they are immune from antitrust liability under the government instrumentality doctrine.

> character of much private antitrust litigation; often, defendants who have conspired together must be sued in a number of different states if all are to be reached, and, while defendants in some states may be willing to enter into settlements, defendants in others may not. To adopt the ancient common law rule would frustrate such partial settlements, and thereby promote litigation, while adoption of the First Restatement Rule would create a trap for unwary plaintiffs' attorneys. The straightforward rule is that a party releases only those other parties whom he intends to release.

Id. at 346-347.

Here the releases in the settled individual cases specifically reserve plaintiffs' rights to prosecute claims against the other defendants. Multidistrict and multiparty concerns are present. Jurisdiction over all the alleged individual coconspirators could not be had in any single district. Plaintiffs were forced to commence individual actions in a number of districts. Partial settlements are to be encouraged in complex litigation, and the release of some of the alleged individual coconspirators should not preclude the claims against the remaining defendants. Defendants' motion for summary judgment on the basis of res judicata should be denied.

III.

Defendants argue that plaintiffs have not shown that they have valid antitrust claims so they should be dismissed. Plaintiffs respond that the record is sufficient to entitle them to present these issues to a jury.

Plaintiffs must show antitrust injury to prevail on their claims under Sections 1 and 2 of the Sherman Act. The parties

dispute whether in this case antitrust injury should be analyzed under the rule of reason or the per se rule applicable to group boycotts. Defendants argue courts have consistently applied the rule of reason in antitrust cases challenging the rules of professional or trade associations. NAREA and NARA/MU contend that the Foundation's actions in excluding them from membership constitute a group boycott or concerted refusal to deal, and should therefore be deemed per se unlawful.

Only restraints on trade that are unreasonable are prohibited by § 1 of the Sherman Act. The reasonableness of a restraint is assessed under the rule of reason test,

> unless the challenged action falls into the category of agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

Northwest Wholesale Stationers, Inc., v. Pacific Stationery and Printing Co., 472 U.S. 284, 289 (1985)(citation omitted). Application of the per se rule turns on:

> whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or instead one designed to increase economic efficiency and render markets more, rather than less, competitive.

Id. at 289-90 (quoting Broadcast Music, Inc v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20 (1979) (citations omitted)).

The authority cited by plaintiffs for applying the per se rule here is distinguishable because their cases generally deal with a

boycott that directly cuts off access to a supply, facility, or service necessary to compete in the market. See, e.g, Silver v. New York Stock Exchange, 373 U.S. 341 (1963) (denial of access to exchange members). Professional organizations like the Appraisal Foundation, established to promote professional standards and education, do not facially appear to restrict competition and decrease output. Such organizations must be able to establish reasonable rules in order to function effectively. See, Northwest Wholesale Stationers, 472 U.S. at 296. The membership criteria of the Foundation are facially reasonable, and thus should be analyzed under the rule of reason. See National Society of Professional Engineers v. United States, 435 U.S. 679 (1978) (applying rule of reason to case involving ethical rule of professional engineer association).

Defendants argue that under the rule of reason, plaintiffs have the burden to show some harm to competition in the relevant market. Proof of injury to themselves is not enough. For purposes of this motion, defendants accept plaintiffs' definition of the relevant market as the market in the United States for memberships in professional appraisal organizations. Plaintiffs' Memo in Opposition at 27-28.

Plaintiffs argue there is enough evidence of harm to competition in the relevant market to prevent summary judgment. Plaintiffs contend that appraisal organizations excluded from the Foundation have been unable to compete effectively. Their members demanded they join the Foundation because of its stature and control in the industry. Many members chose not to renew their memberships when the

organizations were not allowed into the Foundation. Exclusion from the Foundation diminished the importance of appraisal designations[14] from organizations like NAREA and NARA/MU. According to plaintiffs, customers were reluctant to hire appraisers with designations from non-Foundation organizations. Such designation preferences forced members of excluded organizations to look elsewhere in order to find work. NAREA and NARA/MU argue they and other organizations have experienced precipitous drops in membership since their unsuccessful applications to the Foundation.[15] Plaintiffs argue exclusion from the Foundation has resulted in lost revenues from membership dues, educational courses, and publications. They argue that while excluded groups have suffered losses and membership declines, the eight organizations that formed the Foundation have increased their market share from 66% in 1990

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[14] Designations are titles such as "Certified Real Estate Appraiser" which the various appraisal organizations confer on individuals who meet stated criteria. The titles and criteria differ from one organization to the next. The prestige of any given designation is related to the reputation of the organization which bestows it and the difficulty of meeting the particular criteria.

[15] NARA/MU states its membership dropped from over 7,500 in 1990, to fewer than 3,000 in 1993. NAREA claims to have experienced a loss from over 20,000 members in 1990, to less than 10,000 in 1993. Plaintiffs argue these losses are even more dramatic in light of their rapid growth in memberships before 1990. NARA/MU claims to have grown from 6,375 members in 1988 to 7,438 in 1989, while NAREA grew from 13,430 to 20,145 members over the same period.

According to plaintiffs, other organizations not immediately admitted to the Foundation, such as the American Association of Certified Appraisers (AACA), and the National Association of Master Appraisers (NAMA), also lost members. AACA declined from 2,600 to 1,800 members, while NAMA shrunk from 7,000 members to 4,000. An AACA representative, however, has testified that he does not believe its membership decline was cause by lack of membership in the Foundation. See p. 20, infra.

to 71% in 1992.

There is evidence in the record to suggest that some banks and savings and loan associations may have preferred appraisers holding designations with organizations that were members of the Foundation, and that this influenced some appraisers when deciding which organizations to join. See, e.g., Plaintiffs' Exhibit 1700 and 1701. Plaintiffs argue that such preferences caused its membership to drop and harmed competition in the market for real estate appraisal organizations.

Under the rule of reason plaintiffs must show injury to competition in the relevant market. National Society of Professional Engineers v. United States, 435 U.S. 679 (1978); Paschall v. Kansas City Star Co., 727 F.2d 692 (8th Cir. 1984). In their amended complaint plaintiffs allege defendants have conspired and engaged in anticompetitive conduct "for the purpose and effect of foreclosing competition, limiting output, and enhancing prices in the relevant markets." Amended Complaint at ¶42. The complaint further alleges that:

> the public at large is being injured in that, among other things, the output and supply of appraisal education and professional appraisal services are being restricted in a manner that will result in appraisal services of lower quality and higher cost.

Id. at ¶41.

While plaintiffs have experienced significant declines in membership, they have not produced evidence to show that the overall market for real estate appraiser organizations has been harmed. Plaintiffs have produced no evidence to show the quality of appraisal services has declined. Moreover, the record

does not indicate any shortage in the supply of appraisal organizations or increased prices for memberships, educational programs, or publications. In fact, NAREA and NARA/MU themselves may have offered more educational courses in 1993 than 1992. Johnson Deposition at 697. Membership declines in individual organizations do not, by themselves, establish harm to the overall market. "A practice is not 'anticompetitive' simply because it harms competitors. . .Rather, a practice is anticompetitive only if it harms the competitive process." Town of Concord, MA v. Boston Edison, Co., 915 F.2d 17, 21 (1st Cir. 1990) (citations omitted). Plaintiffs have not shown enhanced prices, a shortage of appraiser organizations, or other injury to competition in the relevant market. Because they cannot establish an essential element of their antitrust claims, injury to competition in the relevant market, summary judgment is appropriate. Celotex Corporation v. Catrett, 477 U.S. 317, 322 (1986).

Even if plaintiffs could show injury to the relevant market, they would also have to produce evidence that the alleged anticompetitive conduct was a material cause of such injury. Defendants argue that there are so many other reasons for plaintiffs' problems that a jury could not determine beyond mere speculation that exclusion from the Foundation was a material cause of plaintiffs' membership declines.

Antitrust plaintiffs seeking treble damages "must establish an antitrust violation, the fact of damage or injury, a causal relationship between the violation and the injury, and the amount of damages." Rosebrough Monument Company v.

Memorial Park Cemetery Association, 66 F.2d 1130, 1146 (8th Cir. 1981) They "may not recover for losses due to factors other than the defendant's anticompetitive violations." Amerinet, Inc. v. Xerox Corporation, 972 F.2d 1483, 1494.

> When a plaintiff improperly attributes all losses to a defendant's illegal acts, despite the presence of significant other factors, the evidence does not permit a jury to make a reasonable and principled estimate of the amount of damage. This is precisely the type of "speculation or guesswork" not permitted for antitrust jury verdicts. Bigelow, 327 U.S. at 264, 66 S.Ct. at 579. To allow otherwise would force a defendant to pay treble damages for conduct that was determined to be entirely lawful.

Id. (quoting MCI Communications Corporation v. American Telephone and Telegraph Company, 708 F.2d 1081, 1161 (7th Cir.), cert denied, 464 U.S. 891 (1983)).

The present case resembles the situation in Amerinet. Although Amerinet argued its loss of sales were due to alleged anticompetitive actions of Xerox, there was evidence in the record that its business had suffered from increased competition and that it lacked experience in the field of used laser printer sales. Amerinet, 872 F.2d at 1491. Amerinet had also been substantially hurt in 1986 and 1987 by actions of some former employees later sued for misappropriation of trade secrets, neglect of duty, and unfair competition. Id. Summary judgment was proper because Amerinet "had not distinguished its alleged antitrust injury from other evidenced injury it sustained in 1986-87, or shown the requisite causal connection between the defendant's alleged anticompetitive violation and [its] injury..." Id. at 1496.

A similar situation existed in Greater Rockford Energy & Technology, et. al. v. Shell Oil, 998 F.2d 391, 404 (7th Cir. 1993). In that case ethanol producers sued several oil companies alleging that they had attempted to eliminate competition in the motor fuel market by discriminating against and disparaging ethanol and other alcohol blended fuels. Id. at 393. Summary judgment was upheld because plaintiffs failed to "establish with a fair degree of certainty that the [antitrust] injury was a material element of, and substantial factor in producing the injury." Id. at 401. Plaintiffs failed to distinguish between the alleged antitrust injury and the harm to ethanol sales caused by such things as warnings in automobile owner manuals, media criticism in publications such as Consumer Reports, state laws requiring labeling of pumps containing ethanol, and various reductions in state tax exemptions and subsidies to the ethanol industry. Id. at 402-404. The court concluded that while "[s]tanding alone" any one of the alternative causes may have been insufficient, "[t]aken together" they showed plaintiffs could not prove causation and summary judgment was appropriate. Id. at 404.

Here there is evidence of many other factors which have adversely impacted plaintiffs over the last several years. NAREA and NARA/MU have been involved in litigation that has damaged their reputation and membership base. In one case, NAREA v. Roy C. Schaeffer, C.A. No. 89-0225 T (D. R.I. 1989), NAREA sued Schaeffer for defamation because he publicly called NAREA a "diploma mill" after it had admitted his cat Tobias as a designated member. NAREA submitted

affidavits in that case stating that Schaeffer's comments had caused a dramatic drop in its membership renewal rate. After a two day bench trial, the district court determined there was no defamation because Schaeffer's characterization of NAREA as a diploma mill was essentially true. Defendants' Exhibit 17 at 12. The court found NAREA's admission process:

> consisted of a five minute review of the application form. It was accompanied by no independent investigation or verification of the applicant's background, experience, character or ability or even any inquiry into whether the applicant was licensed, no resume or sample appraisal was required apparently at that time or if they were Tobias' failure to submit them were ignored.

Id. at 11.

The negative effect of the so-called cat case was magnified when it was specifically mentioned in the 1990 House Government Operations Committee status report regarding the appraisal reform amendments of FIRREA. After discussing the need for the Foundation to admit all qualified appraiser organizations as members, the committee noted:

> The committee does not intend in any way to suggest that membership should be available to such groups as the National Association of Real Estate Appraisers and its related organizations which are based in Scottsdale, AZ. In adjudicating a defamation case in which these organizations were plaintiffs, a U.S. District Court held in finding for the defendant that statements that the organizations were a "diploma or certification mill" were not defamatory because they were essentially true.

H.R. Rep. No. 981, 101st Cong., 2d Sess. 1, 7 n.1 (1990) (Defendants' Exhibit 18). NAREA and NARA/MU President

Ken Twitchell conceded in deposition testimony in this case that the cat case continues to damage plaintiffs to the present day and has caused them to lose members, made it more difficult to attract new members, and damaged the overall credibility of the organizations. Twitchell Deposition at 206-208.

Plaintiffs have also claimed substantial damage from another source in a lawsuit NAREA initiated against the State of Washington. In that action NAREA claimed that Washington's designation of its state-licensed appraisers as "State-Certified Real Estate Appraisers" misappropriated NAREA's "Certified Real Estate Appraiser" designation, to which it claimed common law trademark rights. Robert Johnson submitted an affidavit in that case stating that NAREA lost members because of the legislation.

Defendants urge that plaintiffs' reputation has also been affected by the fact they have been investigated by both the Department of Labor and the Federal Elections Commission (FEC). The FEC investigated plaintiffs concerning illegal contributions to the presidential campaign in 1988. Robert Johnson and Kenneth Twitchell eventually pleaded guilty to criminal charges arising out of the investigation.[16] The Department of Labor investigation involved inquiry into the failure of IAM (the corporation which manages NAREA and

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[16] In June 1993 Robert Johnson pleaded guilty to one count of perjury and one count of making illegal campaign contributions through NAREA. See, Exhibits 3 and 4, Supplemental Affidavit of Kathleen Sheehy (submitted in connection with Plaintiff's objections to Magistrate Judge Franklin Noel's Order dated April 5, 1993). Also in June 1993 Kenneth Twitchell pleaded guilty to one count of obstructing a FEC inquiry. Id.

NARA/MU) to account for and pay overtime to certain former employees. The inquiry resulted in the Department filing a lawsuit to collect the unpaid monies.

In addition, defendants argue the market for appraiser organizations has also been affected by a slow real estate economy in recent years and that changes in state certification and licensing requirements have diminished the importance of designations from private organizations. For example, AACA representative Sol Sherman testified at his deposition that membership declines in his organization prior to being admitted to the Foundation were not caused by not being in the Foundation, but were "a sign of the times". Sherman Deposition at 45-46. According to Sherman, factors such as retirements and state testing requirements adversely impacted memberships. Id. Plaintiffs' contention that their own memberships declined because they were excluded from the Foundation is contradicted by Sherman's testimony that AACA would probably have more members today if it were not in the Foundation, because it could accept anybody. Id. at 69-70. Sherman says ACAA has a smaller, but higher caliber membership because of Foundation membership requirements. Id.

Summary judgment is appropriate against a party "who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." Celotex Corporation v. Catrett, 477 U.S. 317, 322 (1986). The evidence must be sufficient to raise a question for the jury which could be decided in the nonmoving party's favor. Anderson v. Liberty Lobby,

Inc., 477 U.S. 242, 248 (1986). Here there is a wealth of evidence showing a number of adverse factors affecting plaintiffs other than the alleged anticompetitive conduct. Plaintiffs have failed to distinguish the alleged antitrust injury from other injury it has sustained and have not shown a causal connection between defendants' alleged anticompetitive conduct and their injuries. Standing alone, any of these other factors would be insufficient to justify summary judgment, but taken together, they indicate the element of causation cannot be proven. Greater Rockford Energy & Technology et. al. v. Shell Oil, 998 F.2d 391, 404 (7th Cir. 1993). Plaintiffs' failure to establish the necessary causation is a second and independent basis why summary judgment should be granted on plaintiffs' antitrust claims.

To prevail on their antitrust claims plaintiffs must also show concerted antitrust action. A "conglomeration of two or more legally distinct entities cannot conspire among themselves if they pursue the common interests of the whole rather than interests separate from those of the group itself". City of Mt. Pleasant, Iowa v. Associated Electric Cooperative, Inc., 838 F.2d 268, 274 (8th Cir. 1988) (quoting Copperweld v. Independence Tube Corporation, 467 U.S. 752 (1984) (finding a corporation and its wholly owned subsidiary could not conspire under the antitrust laws). In Mt. Pleasant a rural power cooperative was found not to have conspired because none of the individual companies had pursued interests divergent from the cooperative's. Id. at 276-77. The economic power of the cooperative members was increased by virtue of their

participation in the cooperative. Id. at 276. While the cooperative members had diverse interests on some issues, because of their interdependence, the disagreements were "more like those among the board members of a single enterprise, than those among enterprises which are themselves separate and independent." Id. at 277.

The same interdependence and common purpose exists in the Foundation. The members are interdependent because the Foundation derives its influence from representing the entire appraisal industry. The purpose of the Foundation is to "establish and improve appraisal standards" and to "establish appropriate criteria for the certification and recertification of qualified appraisers". See, Foundation Bylaws, Article III. The Foundation members have a common purpose because the economic interest of the entire appraisal industry is furthered by the standards and certifications developed through the ASB and AQB set up by the Foundation. The pro-competitive purpose of the Foundation is evidenced by the fact that Congress in FIRREA adopted the standards set by the ASB and AQB.

Because the Foundation is a single enterprise pursuing the common goal of establishing standards and ethics in the appraisal industry, the burden is on plaintiffs "to show specific facts which present a triable issue of fact as to whether any of the defendants has pursued interests diverse from those of the [Foundation] itself." Mt. Pleasant, 838 F.2d at 276. Contact between professional associations on industry issues is not inherently suspect and courts generally:

will not infer a conspiracy to violate the antitrust laws

> based on a showing of regular contact between two independent professional associations on general matters of mutual interest and concern. This is the very purpose and nature of professional associations and this court will erect no barriers to accomplishment of this absent much more substantial evidence of conspiracy to restrain trade than that adduced here.

Machovec et al. v. Council for National Register of Health Service Providers in Psychology, Inc., 616 F.Supp. 258, 268 (D. Va. 1985) (quoting Kreuzer v. American Academy of Periodontology, 735 F.2d 1479, 1488-89 (D.C. Cir. 1984)).

Summary judgment was granted in both Machovec and Kreuzer because no conspiracy was established between professional organizations. The Machovec plaintiffs claimed the American Psychological Association (APA) and the Council for the National Register of Health Service Providers in Psychology, Inc. (Council) conspired to prevent them from being listed in a national register of psychologists. Machovec, 616 F.Supp. at 260. Defendants asserted plaintiffs did not meet the required criteria. Id. at 261-62. Plaintiffs' Section 1 claims were dismissed on summary judgment because they could not show that each defendant had a "conscious commitment to a common scheme designed to achieve an unlawful objective". Id. at 267 (quoting Monsanto Co. v. SprayRite Corp., 465 U.S. 752, 768 (1984). Plaintiffs were required to "prove 'concerted action' not mere guilt by association." Id. at 268. Likewise in Kreuzer no conspiracy was shown between the American Dental Association and the American Academy of Periodontology (AAP), and summary judgment was granted on

antitrust claims alleging they conspired to deny plaintiff AAP membership. Kreuzer, 735 F.2d at 1488.

Plaintiffs in this case have not produced evidence to show that the individual sponsors have acted contrary to the stated purposes of the Foundation or that there exists a "conscious commitment to a common scheme designed to achieve an unlawful objective". Machovec, 616 F.Supp. at 266. There has also been no showing of injury to competition in the relevant market. The antitrust laws were not designed to prevent contact between professional organizations regarding areas of industry concern. Kreuzer, 735 F.2d at 1488. Summary judgment is warranted in light of plaintiffs' failure to show the concerted activity and anticompetitive intent necessary for their antitrust claims.

IV.

Defendants also seek summary judgment on plaintiffs' tortious interference claims. Plaintiffs allege that defendants' conduct:

> constitutes tortious interference with [plaintiffs'] contractual and business relations, prospective contractual and business relations, and economic advantage, by reason of which [plaintiffs] [have] been injured in [their] business and property and [continue] to suffer such injury. . .

Amended Complaint ¶ 44. The allegations do not elaborate further on the exact contracts or relations allegedly interfered with, but refer generally to their declines in membership. They allege they have lost members, membership dues, tuition and fees from educational courses, and the like. Amended Complaint ¶40.

To establish tortious interference plaintiffs must produce evidence that defendants intentionally and wrongfully interfered with plaintiffs' existing and prospective contractual relationships with their members, and that but for defendants' actions, plaintiffs would have received the benefits of those contractual relationships. See, United Wild Rice, 313 N.W.2d 628 (Minn. 1983); Amerinet, 972 F.2d at 1508 (citing Jackson v. Reiling, 249 N.W.2d 896, 897 (Minn. 1977)).

Plaintiffs apparently believe that defendants have intentionally interfered with their relationships with members and prospective members through their alleged anticompetitive conduct. As previously discussed, however, there has been no showing of harm to competition, and plaintiffs have failed to show concerted anticompetitive activity.

Moreover, plaintiffs have not shown they would have benefited from the member relationships but for the actions of defendants. Tortious interference requires an even stronger showing of causation than antitrust claims, since plaintiffs must show that the injury would not have occurred but for the wrongful conduct. Amerinet, 972 F.2d at 1508 (citing Jackson v. Reiling, 249 N.W.2d 896, 897 (Minn. 1977)). In light of their many other problems revealed in the record, plaintiffs cannot show that they would have retained their members and attracted new ones if it were not for defendants' refusal to admit them as an Appraisal Sponsor. Furthermore, plaintiffs claim that only participation in the Foundation as Appraisal Sponsors would have prevented their membership losses, but they have made no factual showing that they have attempted to participate

in the Foundation through other avenues open to organizations who do not meet all criteria for Appraisal Sponsors, that such participation was foreclosed, or that it would have had no beneficial value for their members.

Since plaintiffs have failed to present evidence sufficient to create genuine issues of fact on the issues of intentional interference and but for causation, defendants' motion for summary judgment on the tortious interference claims should be granted.

V.

After discussing case management issues with counsel, it was decided that all dispositive motions in the transferee trustee cases had to be brought by October 2, 1993, except for motions which could not be brought until disposition of the claims in the original cases. Management Order No. 1, August 2, 1993. Since summary judgment will be entered in the original cases, a deadline now needs to be set for the bringing of any motions which fall within the excepted category. Any such dispositive motions in the individual trustee cases should be filed with supporting memoranda by June 27, 1994, with responsive memoranda due by July 29, 1994. After receipt of any such memoranda, the court will decide whether oral argument should be scheduled. If no such motions are filed by the deadline, the court will assume the transferee cases should be remanded to the transferor districts for trial.

ORDER

Accordingly, based upon the above, and all the files, records, and proceedings herein, IT IS HEREBY ORDERED

that:

1) the motion for summary judgment of the Foundation, the National
Society of Real Estate Appraisers (NSREA), the American Society of Appraisers (ASA), and the Appraisal Institute is granted, and all claims and counterclaims in Civ. Nos. 4-91-294 and 4-92-620 are dismissed with prejudice; and

2) any permissible dispositive motions in Civ. Nos. 4-93-573, 4-93-574, and 4-93-575, shall be filed by June 27, 1994.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Date: 5/26/94 /s/

Diane E. Murphy
Chief Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In re Appraiser Foundation Antitrust Litigation — Master File No. 93-MD-973

ORDER

This document relates to: All Cases

This litigation involves a variety of antitrust and common law claims brought by plaintiffs National Association of Review Appraisers and Mortgage Underwriters (NARA/MU) and National Association of Real Estate Appraisers (NAREA)[1] against defendants Appraisal Foundation (Foundation), its sponsors, and trustees. By Memorandum Opinion and Order dated May 26, 1994, the court granted the motions for summary judgment of the defendant organizations on all plaintiffs' claims. Now before the court are the motions for summary judgment of the individual trustees[2] and a motion for summary judgment by The Foundation on its declaratory judgment counterclaim in Civil No. 4-92-620.

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[1] For convenience, the parties were realigned pursuant to Management Order No. 1 dated August 2, 1993. Plaintiff NARA/MU and counterclaim-plaintiff NAREA are collectively referred to as "plaintiffs", and their claims and counterclaims are collectively referred to as "claims".

[2] The individual trustees, Roy X. Morris, Roy Green, George Hamilton Jones, and Joseph Durant, seek summary judgment in the following cases: NARA/MU et al. v. Roy X. Morris, Civ. No. 4-93-573 (from the District of Arizona), NARA/MU et al. v. Roy Green and George Hamilton Jones, Civ. No. 4-93-574 (from the Central District of California), and NARA/MU et al. v. Joseph Durant, Civ. No. 4-93-575 (from the Southern District of Georgia).

The trustees argue they are entitled to summary judgment because the claims asserted against them are the same claims for which the organizational defendants have been granted summary judgment. They contend that if The Foundation and its sponsor organizations did not commit an antitrust violation, then by definition, neither did the trustees. Plaintiffs in response reargue the points raised earlier and say the court should not in effect compound its error by extending the summary judgment.

For the reasons set forth in its Memorandum Opinion and Order dated May 26, 1994, the court found there were no antitrust violations by the organizational defendants. Because the potential liability of the individuals is derivative from the organizations they represent, a determination of no antitrust violation by the organizations entitles the individual trustees to summary judgment as well. The motions for summary judgment in the trustee cases should therefore be granted.

The Foundation has also filed a motion for summary judgment on its declaratory judgment counterclaim in Civ. No. 4-92-620. The Foundation had not moved for summary judgment on its counterclaim in its earlier motion. It seeks a declaratory judgment that NAREA does not have an antitrust claim against The Foundation. The court sought a response from plaintiffs who informed the court that they would not submit any responsive materials and raised no particular objection to the motion.

Under Fed. R. Civ. P. 54(b), a final judgment cannot properly be entered in this matter until all claims by all parties have been resolved. The court has already determined in its

earlier Memorandum Opinion and Order that NAREA and NARA/MU do not have antitrust claims against The Foundation. The Foundation's motion for summary judgment on its counterclaim for a declaratory judgment in Civ. No. 4-92-620 should be granted.

ORDER

Accordingly, based upon the above, and all the files, records, and proceedings herein, IT IS HEREBY ORDERED that:

1. the motion for summary judgment of The Appraisal Foundation on its counterclaim for a declaratory judgment in Civ. No. 4-92-620 that NAREA does not have an antitrust claim against The Foundation is granted, and it is so declared;

2. the motions for summary judgment of the individual trustees in NARA/MU et. al. v. Roy X. Morris, Civ. No. 4-93-573 (from the District of Arizona), NARA/MU et. al. v. Roy Green and George Hamilton Jones, Civ. No. 4-93-574 (from the Central District of California), and NARA/MU et. al. v. Joseph Durant, Civ. No. 4-93-575 (from the Southern District of Georgia) are granted and the claims in those cases are dismissed with prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Date: 8/4/94

/s/
Diana E. Murphy
Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2689/3074MNMI

National Association of Review Appraisers, etc., et al.,

Appellants,

vs.

The Appraisal Foundation, et al.,

Appellees.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Murphy took no part in the consideration or decision of this case.

October 10, 1995

Order Entered at the Direction of the Court:

/s/

Clerk, U.S. Court of Appeals, Eighth Circuit

(2)

Supreme Court, U.S.
FILED
SEP 10 1996
CLERK

No. 95-1432

In The

Supreme Court of the United States

October Term, 1995

NATIONAL ASSOCIATION OF REVIEW APPRAISERS AND MORTGAGE UNDERWRITERS, INC., *et al.*,

Petitioners,

vs.

THE APPRAISAL FOUNDATION, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eighth Circuit Court of Appeals applied the appropriate standard — the rule of reason — to Petitioners' claim that their exclusion from the Foundation was anticompetitive where the Foundation's sponsorship criteria were deemed by the Eighth Circuit as facially valid?

2. Whether the Eighth Circuit Court of Appeals properly applied the relevant standard of causation to Petitioners' antitrust claim to conclude that, because of significant other factors causing Petitioners' alleged injury, Petitioners could not establish that their exclusion from Foundation sponsorship was a material cause of their claimed injury?

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I

STATEMENT OF THE CASE

A. The Parties

NARA/MU and NAREA (collectively "Petitioners") are appraisal trade associations located in Scottsdale, Arizona, and are owned and/or controlled by Robert Johnson. NARA/MU purports to be operated as a Minnesota non-profit, tax-exempt association; Robert Johnson serves as its executive director. NAREA is a Minnesota for-profit corporation solely owned by Robert Johnson.

Three of the respondents — the Appraisal Institute, the American Society of Appraisers, and the National Society of Real Estate Appraisers — are also appraisal trade associations.[1] All are non-profit, tax-exempt membership associations that provide a variety of services to their appraiser members, including publishing educational materials and conducting educational courses for appraiser professionals. Additionally, each association awards professional designations to members who satisfy certain educational and experiential criteria.

The fourth respondent, the Appraisal Foundation ("Foundation"), is a non-profit, tax-exempt corporation which was formed by eight appraisal trade associations in November 1987 to develop and promote uniform appraisal standards and appraiser qualifications through its two independent boards, the Appraiser Standards Board ("ASB") and the Appraiser Qualifications Board ("AQB"). In 1989, Congress passed Title 11 of the Financial Institutions Reform Recovery and Enforcement Act of 1989 ("FIRREA") which expressly charged

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1. There are additional respondents involved in this litigation. Two of those additional respondents, the American Institute of Real Estate Appraisers and the Society of Real Estate Appraisers are the predecessor organizations to the Appraisal Institute. The individual respondents, Roy X. Morris, Roy G. Green, George Hamilton Jones, and Joseph S. Durant have served as trustees of the Appraisal Foundation.

the Foundation with the responsibility for establishing, through the ASB and AQB, minimum appraisal standards and appraiser qualifications for application to federally-related transactions.

B. Petitioners' Application For Foundation Membership

In January 1992, the Foundation revised its by-laws to create the current categories of membership or "sponsorship." The revised bylaws established three different types of sponsorship: appraisal sponsors; affiliate sponsors; and corporate sponsors. The appraisal sponsors category is intended for appraisal trade associations; however, the two other categories of sponsorship are also open to appraisal trade associations. To qualify as an appraisal sponsor, an association must: be non-profit; be able to pay dues; award appraisal designations to some, but not all, members (meaning designations must be earned by satisfying meaningful educational and experiential criteria); require its appraisal designated members to achieve minimum AQB requirements in the areas of education, experience, examination and continuing education; and adopt the uniform standards of professional appraisal practice ("USPAP"), establish a method to teach and enforce USPAP, and require continuing education course work on the USPAP every five years.

Although NARA/MU and NAREA opposed the formation of the Foundation and its role under FIRREA and declined to participate in the many Foundation activities open to nonsponsors, the Petitioners nonetheless sought appraisal sponsorship status. After reviewing relevant information about the Petitioners, the Foundation determined that, for a variety of reasons, Petitioners did not appear to meet the criteria for appraisal sponsorship. Upon reaching this conclusion, the Foundation informed Petitioners that it had specific concerns about their designation practices, their education and examination requirements, their promotion and enforcement of

the USPAP, their enforcement of continuing education requirements, and their non-profit status.

With regard to the non-profit issue, the Foundation uncovered evidence that both Petitioner associations have funneled millions of dollars directly to Robert Johnson through payment of management fees, rent, and other perks. Both NARA/MU and NAREA are managed by International Association Managers, Inc. ("IAM"), a for-profit corporation whose sole shareholder, officer, and director is Robert Johnson. IAM has no written management contracts with any of the associations it manages, including NARA/MU and NAREA. Johnson maintains that there is an understanding with the associations that IAM will provide management services but has no idea how he determines the management fees charged to NARA/MU or NAREA. Johnson also has no idea how the compensation paid to him by IAM (ranging from $200,000 - $450,000 in the years 1989 through 1991) was determined.

Johnson personally owns the building from which NARA/MU, NAREA, and several other associations operate. Although IAM pays rent to Johnson that is charged back to the associations, Johnson could not explain how the rent charged to the associations, through IAM, was set and there is no written lease evidencing any understanding on this issue. The Foundation gleaned from this information that Johnson's dealings with Petitioners are something less than "arms-length" and, instead, seem to evidence Johnson's complete control of the associations and their finances.

Additional evidence of Johnson's control over these associations was exposed by an investigation by the Federal Elections Commission of Johnson's campaign contributions to the 1988 presidential campaign. This investigation resulted in a June 1993 guilty plea by Johnson to one count of perjury and one count of making illegal campaign contributions through his

NAREA association. The Foundation concluded that this information called into question NAREA's independence and NARA/MU's purported non-profit status.

Additionally, publicly-available court records indicated that the Petitioner associations, instead of reviewing and monitoring the qualifications of potential members and the recipients of its professional designations, were granting membership and, more importantly, conferring professional appraisal designations indiscriminately. For example, in 1989, NAREA brought a lawsuit for defamation, among other claims, against an appraiser, Roy C. Schaeffer, when Schaeffer publicly characterized NAREA as a "diploma mill" after NAREA awarded a professional designation to Schaeffer's cat, Tobias. Because NAREA did not verify the credentials of the applicant, it failed to determine that Tobias Schaeffer was not a qualified real estate appraiser, but was instead a cat. The court dismissed NAREA's defamation suit, finding Roy Schaeffer's characterization of NAREA as a diploma mill to be true.

Finally, there was evidence that the Petitioner associations had not adopted the USPAP and, consequently, were not providing education on the uniform standards, both of which are required for membership in the Foundation. Robert Johnson testified, for example, that he was not sure whether it is appropriate to have national uniform standards of appraisal practice and "didn't know" of an education mechanism for teaching the standards. Based on the Petitioners' failure to meet virtually all the Foundation's sponsorship criteria, the Foundation declined to permit them to participate in the Foundation as an appraisal sponsor.[2]

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2. Although Petitioners were informed about other avenues of participation in the Foundation open to them, Petitioners chose not to pursue them.

C. The Antitrust Litigation

In response to the Foundation's refusal to admit Petitioners as appraisal sponsors, NARA/MU filed an antitrust action against the Foundation and its sponsors alleging a violation of Sherman Act Sections 1 and 2. In this suit, NARA/MU claims that it meets all sponsorship criteria and that its exclusion from the Foundation has effectively crippled NARA/MU's ability to compete with other appraiser associations that are Foundation sponsors. The Foundation then brought a declaratory judgment action against NAREA seeking to establish that the Foundation had not violated the antitrust laws for likewise declining to grant that association sponsorship status. NAREA counterclaimed, asserting claims similar to those asserted by NARA/MU.

In their complaint and counterclaim, the Petitioners assert that they have suffered antitrust injury in the form of a decline in membership solely as a result of the Foundation's allegedly anticompetitive acts. Petitioners have, however, blamed these same membership losses on other defendants in other lawsuits.

For instance, in an affidavit submitted in conjunction with the previously-described Schaeffer "cat case," Ken Twichell, NAREA's then managing director, delineated the injury NAREA had suffered due to the incident. In his affidavit, Twichell stated that:

> NAREA knew that its membership renewal rate had suffered dramatically in the wake of defendant's comments [about being a diploma mill]. . . . I believe these comments to be the predominant cause of our lost members. In the years immediately prior to 1987, NAREA had a membership renewal rate of approximately 94%. . . . In 1988,

> when news of Tobias' certification appeared in many publications around the country and the volume of the complaints we received from our members dramatically increased, our renewal rate dropped to 78% nationwide.

Twichell went on to quantify more specifically the amount of damage attributable to the "cat incident" and stated that "the more than 3000 extra members lost in 1988 would have paid more than $2.1 million in membership dues and $220,000 in profits over the next ten years." Additionally, Twichell stated that NAREA had spent more than $800,000 attempting to repair the damage to its reputation. Significantly, in the deposition testimony he provided in this antitrust suit, Twichell conceded that the "cat incident" continues to damage Petitioners to the present day by causing them to lose members, making it more difficult to attract new members, and damaging the overall credibility of the associations.

In 1990, NAREA initiated a lawsuit against the State of Washington. There, NAREA claimed that Washington's statutory designation of its state-licensed appraisers as "State Certified Real Estate Appraisers" misappropriated NAREA's "Certified Real Estate Appraiser" designation, in which NAREA claimed to have developed common law trademark rights. In an affidavit submitted in that case, Robert Johnson testified that enactment of the legislation and "threatening acts" by the State of Washington had caused NAREA to lose members and to suffer irreparable harm.

There is also evidence that by initiating this lawsuit against Respondents, Petitioners have caused injury to themselves. Petitioners have testified that the adverse publicity surrounding this lawsuit, including publicity of their own making, has had a detrimental impact on NAREA and NARA/MU.

Additionally, Petitioners and their officers have been the target of several government investigations which also have adversely impacted the reputations and membership of the Petitioner associations. In addition to the Federal Election Commission investigation, IAM was the subject of an investigation by the United States Department of Labor. The Department of Labor ultimately sued IAM seeking overtime payments for certain former employees of the Petitioner associations.

In light of the many obvious faults with Petitioners' antitrust case, Respondents jointly filed a motion for summary judgment in the District Court for the District of Minnesota. In this motion, Respondents argued that Petitioners had failed to establish antitrust injury, or anything other than individual injury, as they were required to do under the rule of reason analysis applicable to Petitioners' claim of illegal exclusion from Foundation sponsorship. Respondents also pointed out that Petitioners improperly attributed all of their losses to Respondents, despite the presence of significant other factors that Petitioners admitted caused the injury of which they complained and, therefore, a jury could not make a reasonable and principled determination that the alleged anticompetitive conduct caused Petitioners' injury.

On May 26, 1994, the district court granted summary judgment for Respondents on all counts of Petitioners' complaint. Petitioners appealed this decision to the Eighth Circuit Court of Appeals, which unanimously affirmed all aspects of the district court's decision on August 29, 1995.

REASONS FOR DENYING THE WRIT

Petitioners now ask this Court to review two of the grounds upon which the Eighth Circuit affirmed the district court's grant of summary judgment. First, Petitioners ask this Court to revisit the Eighth Circuit's decision to apply the rule of reason to Petitioners' exclusion from the Foundation. Second, Petitioners challenge the Eighth Circuit's causation analysis. On both issues, Petitioners do not challenge the appellate court's statement of the standard as improper, but instead take issue with the court's application of the standard to the facts of this case.

The Eighth Circuit's decision to apply a rule of reason analysis to facially valid association membership criteria is an unadulterated application of this Court's seminal case on association membership criteria — *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985). There is nothing in the Foundation's sponsorship criteria which implicates the *per se* rule and, thus, the court's decision is entirely consistent with Supreme Court precedent.

Similarly, the Eighth Circuit properly stated and applied the applicable standard of causation in this case. The court analyzed the factual evidence to conclude that, in light of numerous other incidents and factors, which Petitioners *concede* caused the injury of which they complain in this case, Petitioners could not and had not established that exclusion from the Foundation was a material cause of their injury. This standard is well established in the case law of this Court and its specific application in this case is consistent with the standard's application in the various circuits that have addressed the issue. *See Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483 (8th Cir. 1992), *cert. denied*, 506 U.S. 1080 (1993); *Greater Rockford Energy & Technology, et al. v. Shell Oil*, 998 F.2d 391 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1054 (1994).

As will be demonstrated below, the Eighth Circuit's opinion does not depart from this Court's holdings, does not create a conflict among the circuits, or present a set of facts the review of which would enhance the jurisprudence on either of these issues. To the contrary, this decision is an unassailable application of the well established Supreme Court and federal circuit precedent on these issues. Consequently, review of this case would require this Court merely to rehash existing precedent and, for that reason, the Court should deny this Petition.

I.

THE EIGHTH CIRCUIT COURT OF APPEALS PROPERLY APPLIED A RULE OF REASON ANALYSIS TO THE FOUNDATION'S SPONSORSHIP CRITERIA.

NAREA and NARA/MU contend that this Court should grant certiorari because the Eighth Circuit's decision to apply the rule of reason analysis to facially valid membership criteria is contrary to this Court's precedent involving challenges to denials of association membership. Petitioners do not take issue with the Eighth Circuit's statement of the law in this area, but claim that its application in this case was in error. As demonstrated below, however, the Eighth Circuit's decision not only properly states the law, but applies it consistently with this Court's precedent and the body of case law which has been developed by the circuit courts relating to this issue.[3]

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3. Petitioners attempt to recast this issue by arguing that the Eighth Circuit improperly determined that the Foundation's sponsorship criteria were in fact reasonable as applied to Petitioners, despite the Respondents having declined to put this question before the court. The court did determine that the Foundation's criteria were *facially valid* in order to conclude that the rule of reason was applicable to this case. The court did not, however, analyze the criteria's specific application in this case as it found that Petitioners' claim was

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The starting point of the Eighth Circuit's analysis was its recognition, based on the precedent of this Court that:

> associations are free to associate, share information and engage in self regulation. Accordingly, [in analyzing association membership criteria], in the absence of any showing that the challenged practices are anticompetitive on their face, we will apply the rule of reason to determine if there is an antitrust violation.

(Eighth Circuit Opinion at 8; Appendix at 8 (*citing F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447, 458-59 (1986)). Thus, where the purported basis of the criteria at issue appear to serve some legitimate purpose necessary to the proper functioning of the association and overall efficiency of the market, the exclusion is analyzed under the rule of reason to determine whether it impermissibly restricts competition. (Eighth Circuit Opinion at 8; Appendix at 8 (*citing Indiana Federation of Dentists*, 476 U.S. at 458; *Northwest Stationers*, 472 U.S. at 284); *see also Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979); *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679 (1978); *Pope v. Mississippi Real Estate Com'n*, 872 F.2d 127 (5th Cir. 1989); *Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Ass'n., Inc.*, 672 F.2d 1280 (7th Cir. 1982).[4]

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deficient on the element of antitrust injury. Thus, neither the district court nor the Eighth Circuit needed to reach the issue of the reasonableness of the sponsorship criteria.

4. In each of the following cases, the courts applied the rule of reason in analyzing the competitive effect of a professional or trade association rule:

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The appellate court concluded that because membership criteria often promote efficiencies, a rule of reason should be applied to virtually all challenges to association membership criteria "[u]nless the challenged action falls in the category of agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable" and *only* where the alleged boycott "cuts off access to a supply, facility or market necessary to enable the boycotted [associations] to compete." (Eighth Circuit Opinion at 9; Appendix at 9 (*quoting Northwest Stationers*, 472 U.S. at 294)).[5]

Applying the principles set forth in *Indiana Federation of Dentists* and *Northwest Stationers*, the Eighth Circuit correctly found that the Foundation's denial of sponsorship to Petitioners should be analyzed under the rule of reason. As the district court noted, "[p]rofessional associations like the Appraisal Foundation, established to promote professional standards and education, *do not facially appear to restrict competition or decrease output*. Such associations must be able to establish reasonable rules in order to function effectively." (District Court

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Majorie Webster Jr. College, Inc. v. Middle States Ass'n of Colleges & Secondary School, Inc., 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970); *Hatley v. American Quarter Horse Ass'n*, 552 F.2d 646 (5th Cir. 1977); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980); and *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, 810 F.2d 869 (9th Cir. 1987).

5. This fundamental proposition is not something with which Petitioners disagree. Indeed, Petitioners also cite *Federal Trade Commission v. Indiana Federation of Dentists* and *Northwest Wholesale Stationers, Inc. v. Pacific Stationery Printing Company* for the proposition that a rule of reason analysis is applicable when exclusion from membership appears to serve some legitimate purpose such as promoting the efficiency of the market. (Petition at 10).

Opinion at 13; Appendix at 30 (emphasis added)). Although the court was not required to make such a detailed analysis of the particular criteria at issue to conclude that the rule of reason was applicable, the Eighth Circuit nonetheless focused on the specific criteria at issue and found them to be reasonably related to the legitimate purposes of the Foundation. (Eighth Circuit Opinion at 8-9; Appendix at 8-9). The appellate court noted that the Foundation was created to promote educational and ethical standards for appraisal services and that its membership criteria appeared to be designed to accomplish those goals by requiring that the ethical and technical standards it developed be promoted and taught and by requiring non-profit status for appraisal associations. *Id.* The court reasoned that such requirements are necessary to successful industry self regulation and thus establishing and enforcing such criteria may even serve some pro-competitive purposes by increasing the relative market efficiencies. (Eighth Circuit at 9; Appendix at 9).

The Eighth Circuit also explained why, contrary to Petitioners' position, "this is not a case in which the alleged boycott cuts off access to a supply, facility or market necessary to enable the boycotted [associations] to compete," and, thus, is not a case susceptible to *per se* treatment. The appellate court reasoned that such a position would require it to hold that every appraiser association has an intrinsic and immutable right to sponsorship in the Foundation — not a result Congress intended when it vested the Foundation with the authority to establish standards. (Eighth Circuit Opinion at 9; Appendix at 9). Nor is it a result Congress intended when it expressed its specific disapproval of granting sponsorship to NAREA and its related organizations. Such a holding would defeat the purpose of having the Foundation establish standards and admission criteria. (Eighth Circuit Opinion at 9; Appendix at 9).

In sum, the Eighth Circuit properly stated and applied the

rule of reason to the Foundation's facially valid sponsorship criteria. Petitioners' argument to the contrary is unavailing. Having stated the proper standard and applied the proper analysis, there is no basis for this Court to review the Eighth Circuit's decision.

II.

THE EIGHTH CIRCUIT STATED AND APPLIED THE PROPER CAUSATION STANDARD TO PETITIONERS' CLAIM.

In their second argument to this Court, Petitioners complain that, although the Eighth Circuit properly stated the causation standard applicable to antitrust cases, the court improperly applied that standard. Review of the Eighth Circuit's opinion, however, reveals that its application of the properly stated standard is consistent with the standard's application by the federal courts.

The Eighth Circuit articulated the appropriate causation standard as requiring Petitioners to establish that a reasonable jury could find that the Foundation's exclusionary behavior was a *material cause* of the harm Petitioners claim to have suffered. (Eighth Circuit Opinion at 13; Appendix at 13 (*citing Alexander v. National Farmers Association*, 687 F.2d 1173, 1210 (8th Cir. 1982), *cert. denied*, 461 U.S. 937, 938 (1983)). Petitioners "may not recover for losses due to factors other than the [Foundation's] anticompetitive violations." (Eighth Circuit Opinion at 13; Appendix at 13 (citing *Amerinet*, 972 F.2d at 1494)). As the district court elaborated:

> When a plaintiff improperly attributes all losses to a defendant's illegal acts, despite the presence of significant other factors, the

> evidence does not permit a jury to make a reasonable and principled estimate of the amount of damage. This is precisely the type of "speculation or guesswork" not permitted for antitrust jury verdicts.

(District Court Opinion at 17; Appendix at 34 (quoting and citing *Amerinet*, 972 F.2d at 1494; *MCI v. AT&T Co.*, 708 F.2d 1081, 1171 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946)). Thus, summary judgment is proper where plaintiffs cannot "distinguish[ ] their alleged antitrust injury from other evidenced injury it sustained." *Amerinet*, 972 F.2d at 1496.

The Eighth Circuit applied this standard to Petitioners' claims and determined that Petitioners improperly attributed all losses to Respondents' allegedly illegal acts, despite the presence of significant other factors causing the same injury. The appellate court painstakingly recounted the "other factors," noting first that the Petitioners have received a great deal of negative attention for maintaining lax membership and certification standards. The Court discussed the case of the *National Association of Real Estate Appraisers, Inc. v. Schaeffer*, CA No. 89-0225T (D.R.I. June 1, 1989), in which NAREA sued Roy Schaeffer for defamation and submitted an affidavit in which it claimed that it had witnessed a dramatic drop in membership renewal rates as a result of the negative publicity surrounding its admission of a cat to its membership ranks.

The negative attention generated by the "cat incident" has not been limited to the appraiser trade. In the course of adopting subsequent amendments to FIRREA, Congress referred to the "cat case," and made clear that it did not intend to suggest that the Foundation open its doors to members such as NAREA and its related associations, precisely because of the finding that they

were nothing more than a diploma mills. H.R. Rep. 101-981, 101st Congress, 2nd Session 1, 7 n. 1 (1990). The Eighth Circuit had "little doubt that the lingering stigma of this incident has contributed greatly to the [Petitioners'] difficulty in attracting and retaining members." (Eighth Circuit Opinion at 14; Appendix at 14).

Petitioners also have blamed the State of Washington for a decrease in their membership. In conjunction with its 1990 suit against the State of Washington, Robert Johnson submitted an affidavit in which he stated that Washington's legislation had caused the Petitioners to lose members. Similarly, in testimony given in this litigation, the Petitioners concede that the current litigation has been a drain on membership strength. (Eighth Circuit Opinion at 14; Appendix at 14).

The Eighth Circuit also took notice that, beyond the litigation instigated by the Petitioners, Johnson and Twichell both had been the targets of investigations and suits by federal agencies. In addition to the Johnson and Twichell guilty pleas relating to the Federal Election Commission investigation into their illegal campaign contributions, the Petitioners defended a suit brought by the Department of Labor for failing to account for over-time pay to certain former employees. (Eighth Circuit Opinion at 15; Appendix at 15).

Finally, the court noted that various other factors have attributed to the decline in membership of these associations. The advent of state certification rendered less essential affiliation with an association and has apparently affected the entire industry. Moreover, several other organizations, which recently were admitted to sponsorship status testified that they had experienced a decline in membership due to the newly-enacted state licensing requirements and added that had they not been admitted to the Foundation, they would actually have more

members because they could then have applied less stringent membership requirements. The court also noted that the impact of the restraint, whatever it may be, could not be adequately determined because the Petitioner associations could participate in the Foundation in another capacity but have chosen not to do so. The overall market for appraisers has declined as well. (Eighth Circuit Opinion at 15-16; Appendix at 15-16).

In applying the causation standard to Petitioners' claim, the Eighth Circuit found that "a number of highly publicized missteps and other considerations have contributed greatly to the Associations' current deflated membership base, so much so that the Associations cannot claim that their exclusion from the Foundation was a substantially contributing factor to their problems." (Eighth Circuit Opinion at 13; Appendix at 13). The Eighth Circuit concluded by noting that:

> the [Petitioner] Associations have blamed everyone but themselves for their current difficulties, but their problems can be traced directly to the corporate office. *We do not require a negation of all possible explanations for the decreased membership*, but in the face of this record, the allegations of conspiratorial harm are too speculative to raise a triable issue. Accordingly, because the Associations have failed to establish the existence of triable fact on the issue of causation, an element essential to their case, the entry of summary judgment in favor of the Foundation is entirely appropriate.

(Eighth Circuit Opinion at 16; Appendix at 16 (emphasis added)).

CONCLUSION

The Eighth Circuit's opinion in this case both properly states and properly applies the well established law applicable to claims of anticompetitive exclusion. Consequently, Petitioners have presented no legitimate basis for this Court to review the two issues raised in their Petition. Respondents therefore request that this Court deny NARA/MU and NAREA's Petition.

Respectfully submitted,

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